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No. 85-447

IN THE

Supreme Court of the United States

October Term, 1985

MAX DAETWYLER CORP.,

Petitioner,

v.

R. MEYER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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October 9, 1985

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Counterstatement of Question Presented

Whether *in personam* jurisdiction may be exercised over an alien defendant upon his aggregated contacts in the United States, on a theory of "national contacts," even if he does not have sufficient minimum contacts with the state in which the case is to be heard, when the claim against the defendant is based upon a specified federal statute which does not specifically authorize nationwide or world-wide service of process?

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BRIEF OF RESPONDENT IN OPPOSITION

Respondent, R. Meyer ("Meyer"), respectfully requests that the Court deny the Petition for a Writ of Certiorari of petitioner, Max Daetwyler Corp. ("Daetwyler"). None of the reasons given by petitioner in support of granting the Writ are appropriate bases for this Court to exercise its discretionary jurisdiction.

Opinions Below

In a Memorandum Decision and Order entered April 13, 1983, which decision is reported at 560 F.Supp. 869 (E.D. Pa. 1983), the District Court for the Eastern District of

Pennsylvania denied alien respondent's motion to dismiss for lack of *in personam* jurisdiction, basing its decision on a theory of "national contacts" (A31-35).[1] Thereafter, the same court, in a Memorandum Opinion and Order dated December 8, 1983, which Opinion is reported at 575 F.Supp. 285 (E.D. Pa. 1983), certified for interlocutory appeal the Order of April 13, 1983 pursuant to 28 U.S.C. Section 1292(b) (A36-41). The Opinion of the Court of Appeals for the Third Circuit, reversing that portion of the Opinion of the District Court which sustained the petitioner's "national contacts" theory, is reported at 762 F.2d 290 (3d Cir. 1985) (A1-29).

Jurisdiction

The Opinion of the Court of Appeals for the Third Circuit which is the subject of review was entered May 22, 1985 (A1). A Petition for Rehearing and Suggestion for Rehearing En Banc was filed on June 4, 1985. By Order dated June 18, 1985, the petition was denied (A58). Petitioner now seeks a Writ of Certiorari pursuant to 28 U.S.C. Section 1254(1).

Constitutional and Statutory Provisions

This action involves the Patent Act, Title 35 U.S.C. Section 271.

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1. All page references are to the Appendix annexed to petitioner's Petition and Brief.

Statement of Facts

This is a patent infringement suit which was commenced pursuant to Title 35, United States Code. Jurisdiction of the District Court is based on 35 U.S.C. Section 271 as well as 28 U.S.C. Sections 1331, 1332 and 1338.

The petitioner, Daetwyler, commenced this lawsuit in the District Court for the Eastern District of Pennsylvania for alien respondent's (Meyer's) alleged violation of United States Letters Patent No. 4,184,429 which relates to doctor blades.

Meyer responded to the Complaint by filing a motion to dismiss for lack of *in personam* jurisdiction. The District Court for the Eastern District of Pennsylvania, Judge Pollak presiding, denied respondent's motion, relying on respondent's aggregate amount of contacts with the United States (the "national contacts" theory) (A34-35). At the same time, Judge Pollak found that he would be "hard pressed" to find respondent had sufficient minimum contacts with the Commonwealth of Pennsylvania to satisfy due process under Pennsylvania's state law pertaining to long-arm jurisdiction (A33).

Thereafter, respondent sought certification pursuant to 28 U.S.C. Section 1292(b), which was granted by Judge Pollak in a Memorandum Opinion and Order which was entered on December 12, 1983 (A36-41).

The sole issue certified for review was whether the respondent could be sued in the Eastern District Court of Pennsylvania on a claim arising under federal statute,

based upon his aggregate contacts in the entire United States, taken as a whole (A41).

The issue of whether respondent was subject to jurisdiction based upon Pennsylvania's long-arm statute was never presented for review (see A41).

The Court of Appeals for the Third Circuit appropriately and correctly reversed the District Court's findings pertaining to *in personam* jurisdiction over an alien defendant (respondent Meyer in this case) based upon the aggregate of Meyer's contacts in the United States (A22-23). A majority of the Court also found that respondent did not have sufficient minimum contacts with the Commonwealth of Pennsylvania to justify exercising long-arm jurisdiction over Meyer (A22).

Respondent Meyer, an individual, is a citizen of West Germany and does business as a sole proprietor in West Germany. His sole place of business is West Germany. He manufactures doctor blades in West Germany which are sold in the United States by an independent contractor, Henry P. Korn of New York (A3, 31).

Respondent has never set foot in Pennsylvania, has never had a place of business or residence in Pennsylvania, has never had a bank account or telephone listing in Pennsylvania, and has never leased or owned any real or personal property in Pennsylvania (A3, 31).

Sales of the Meyer blades in the United States are also made by Uddeholm Corporation, a Delaware Corporation, which takes title to the blades in West Germany, ware-

houses them in Cleveland and then ships them to United States customers. On occasion, respondent Meyer also ships blades directly to the United States at Uddeholm's request, but never into Pennsylvania (A3, 32).

Moreover, neither the advertising of Korn nor Uddeholm specifically identifies Meyer blades. Nor do customers specifically request Meyer blades. Further, Meyer does *not* control the advertising of the blades or their destination (A17, 32).

Reasons for Denying the Writ

This case does not meet the accepted standards for discretionary review. This does not involve a case where one federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals. This does not involve a case which has been decided in conflict with a decision of the highest court of any state or in conflict with any decisions of this Court. This does not involve a case which advocates so far a departure from the accepted and usual course of judicial proceedings so as to call for this Court's exercise of jurisdiction. Finally, this does not involve an important question of federal law which has not been, but should be, or even may be, decided by this Court.

I

There is no Justification to Warrant Review by This Court as to Whether *In Personam* Jurisdiction May Be Exercised Over an Alien Defendant Based Upon His Aggregated Contacts in the United States, Taken as a Whole, for Alleged Violations of a Federal Statute, when Said Statute Does Not Specifically Authorize Nationwide or Worldwide Service of Process.

The Supreme Court Rules, and specifically, Rule 17.1 is quite explicit as to when this Court is authorized to exercise its discretionary jurisdiction.

In bringing this Petition for a Writ of Certiorari, petitioner apparently relies on three grounds:

(1) that this case presents a question of federal law which this Court should decide;

(2) that the opinion of the Court of Appeals for the Third Circuit is in conflict with other *circuit opinions;* and

(3) that the opinion of the Court of Appeals for the Third Circuit is in conflict with an opinion of this Court, specifically, *World-Wide Volkswagen Corp.* v. *Woodson,* 444 U.S. 286 (1980).

However, a review of the applicable law and cases will reveal that none of these criteria exists.

II

This is Not a Case Presenting a Question of Federal Law Which Should be, or Even May be, Determined by This Court, Nor is There a Split Among the Circuits in This Matter.

The Federal Rules of Civil Procedure are quite explicit as to how a federal court may obtain *in personam* jurisdiction over a defendant.

Specifically, Fed. R. Civ. Procedure 4(e) provides for the application of state long-arm statutes, in this case, that of Pennsylvania, only "under the circumstances and in the manner prescribed in the statute or rule." This has been interpreted to require that the entity served meet the "qualifications for service set out in that statute." *Edward J. Moriarty & Co.* v. *General Tire and Rubber Co.*, 289 F.Supp. 381, 390 (S.D. Ohio, 1967).

Also relevant here is Fed. R. Civ. Procedure 4(f) which provides that the territorial limits established to effectuate federal service of process are those "of the state in which the district court is held." Federal service of process beyond those limits can only be effectuated outside of those limits "*when authorized by a statute of the United States or by these rules.*" (Emphasis added).

Combining these two rules, it is readily apparent that unless the federal statute specifically authorizes worldwide service of process, or unless an alien defendant has sufficient contacts with the state in which the district court is situated, *in personam* jurisdiction cannot be obtained. *See*

DeJames v. *Magnificence Carriers, Inc.*, 654 F.2d 280, 286 (3d Cir. 1981) (*"[W]hen Congress has not authorized nationwide service of process, a federal district court's power to require a defendant to submit to its jurisdiction is limited by the Federal Rules of Civil Procedure, and through them by the long-arm rule of the state in which it sits."*) (Emphasis added). Whether or not a defendant has sufficient contacts with a state, in this case, Pennsylvania, is a matter of state law, and not a question of federal law.

Applying these principles, the Court of Appeals for the Third Circuit appropriately held that since 35 U.S.C. Section 271 did not specifically provide for worldwide service of process and since no method for worldwide service was established by the Federal Rules of Civil Procedure, it would be inappropriate, and in fact improper, to exercise jurisdiction based upon a "national contacts" theory. *Daetwyler Corp.* v. *R. Meyer*, 762 F.2d 290, *supra*, at 300 (A22-23).

The only other circuit court to specifically rule on the "national contacts" theory was the Court of Appeals for the Ninth Circuit in *Wells Fargo & Co.* v. *Wells Fargo Express Co.*, 556 F.2d 406 (9th Cir. 1977).

In that case, the plaintiffs attempted to secure jurisdiction over alien defendants based upon alleged violations of the Lanham Act. In refusing to apply a "national contacts" theory, the court, while recognizing that such a theory may not be unfair or unreasonable, nonetheless found that before such a theory is applied in a case when a plaintiff is suing on a federal cause of action, *"the Federal Rules*

should be amended to authorize such a practice. Such a step, however, is not ours to take." *Wells Fargo & Co.* v. *Wells Fargo Express Company, supra,* at 418. (Emphasis added).

The Seventh Circuit, in *Honeywell, Inc.* v. *Metz Apparatewerke,* 509 F.2d 1137, 1143 (7th Cir. 1975), specifically declined to rule on this issue. Instead, jurisdiction over a German defendant was based upon the Illinois long-arm statute.

In *Superior Coal Co.* v. *Ruhrkohle, A.G.,* 83 F.R.D. 414, 419-420 (E.D. Pa. 1979), the court rejected the "national contacts" theory in an action based upon violations of the antitrust and antidumping laws in the absence of any statutory authority.

Even the district court cases upon which petitioner relies to give the appearance of a split among the circuit courts recognize that in the absence of a federal statute or rule, it is not within their power to give credence to a "national contacts" theory. Moreover, these cases ultimately relied on the applicable state long-arm statute to secure jurisdiction.

In *Centronics Data Computer Corporation* v. *Mannesman, A.G.,* 432 F.Supp. 659, 664 (D.N.H. 1977), while the court ultimately applied a "national contacts" theory, jurisdiction over the alien defendant for alleged antitrust violations was founded upon New Hampshire's long-arm statute. Indeed, the court recognized that the "national contacts" theory "has not yet been generally accepted and *there is no specific statutory authority for it.* Congress

could well have passed a statute stating that jurisdiction over aliens will be based on their contacts with a nation as a whole. . . .'' (Emphasis added).

In *Edward J. Moriarty & Co.* v. *General Tire and Rubber Co.*, 289 F.Supp. 381, 390 (S.D. Ohio 1967), the court held that for cases involving the Sherman Act, jurisdiction over an alien defendant was premised on Ohio's long-arm statute, the court recognizing that neither the federal statutes nor rules permits them to apply a ''national contacts'' theory.

Engineered Sports Products v. *Brunswick Corp.*, 362 F.Supp. 722, 728 (D. Utah 1973) involved an alleged patent infringement. The court, while acknowledging the ''national contacts'' theory, nonetheless based jurisdiction upon Utah's long-arm statute.

The remaining two cases upon which petitioner relies, *Cryomedics, Inc.* v. *Spembly, Ltd.* 397 F.Supp. 287 (D. Conn. 1975) and *Holt* v. *Klosters Rederi A/S*, 355 F.Supp. 354 (W.D. Mich. 1973), both relied upon a ''national contacts'' theory even though there was no statutory authority for same, obviously violating the mandate of Fed. R. Civ. Procedure 4(f). It is also interesting to note that, in the former case, the ''national contacts'' theory was ultimately premised on a broad reading of Connecticut's long-arm statute, and, in the latter, the action was ultimately transferred to Florida, a state in which the foreign defendant did have multiple contacts. *See Daetwyler Corp.* v. *R. Meyer*, 762 F.2d 290, *supra*, at 294.

Had Congress intended nationwide or worldwide service of process over defendants in alleged patent infringement

cases, they would have permitted same specifically by statute. Such provisions have been included in other federal statutes. *See, e.g.,* 15 U.S.C. Section 77 (permitting service of process over defendant, wherever found, for actions arising under the Securities and Exchange Act of 1933) and 28 U.S.C. Section 1655 (permitting service of process over absent defendants "wherever found" in lien enforcement actions). Without such statutory authority, it is clear, and the courts agree, that a federal court may not exercise jurisdiction over an alien defendant.

Since the law is quite clear in this matter and there is no split among the *circuit courts* as is required by the Supreme Court Rules, there is no basis upon which this Court may exercise its discretionary jurisdiction.

III

The Opinion of the Court of Appeals for the Third Circuit Does Not Conflict with Applicable Decisions of This Court.

If an alien defendant is subject to process under a state's long-arm statute, then the federal court sitting in the applicable state may exercise jurisdiction over said defendant. Fed. R. Civ. Procedure 4(e). Thus, in the case at bar, if respondent Meyer were amenable to process under Pennsylvania's long-arm statute, the federal court would be able to exercise jurisdiction.

At the outset, it should be noted that the federal district court, in *Daetwyler Corp.* v. *R. Meyer,* 560 F.Supp. 869, 870 (E.D. Pa. 1983) (A33) held that the respondent

here, Meyer, did not have sufficient contacts to warrant the court's exercising its long-arm jurisdiction. This issue was never certified for appeal (A41). Therefore, this issue is not properly before this Court. Nonetheless, since petitioner raises the issue and it was addressed by the circuit court, it will be addressed here.

The Court of Appeals for the Third Circuit, upon an examination of all of the facts, also held that respondent did not have sufficient contacts with the forum state, to wit, Pennsylvania, to warrant the exercise of jurisdiction pursuant to Pennsylvania's long-arm statute. *Daetwyler Corp.* v. *R. Meyer,* 762 F.2d 290, *supra,* at 300 (A22-23).

There being no question in the lower courts that respondent did not have sufficient "minimum contacts" with Pennsylvania to warrant that court's exercise of jurisdiction over Meyer, and said question involving an application of state law, this matter is not subject to this Court's review, especially since it is not in conflict with any opinion of this Court.

In *World-Wide Volkswagen Corp.* v. *Woodson,* 444 U.S. 286 (1980), this Court was faced with the question of whether, in a *product liability action,* a state court could exercise personal jurisdiction over a nonresident auto retailer and wholesaler. The court held that such jurisdiction could not be exercised where the retailer and wholesaler did not have the requisite minimum contacts with the forum state such that "he should reasonably anticipate being haled into court there." *Id.* at 297.

This Court did, however, recognize that the forum state could assert jurisdiction over a corporation "that delivers

its products into the stream of commerce *with the expectation that they will be purchased by consumers in the forum state.*" *Id.* at 298. (Emphasis added).

In the case at bar, however, respondent's products entered the "stream of commerce" via his distributor in New York (A3, 17, 31). Once his distributor had the products, respondent could foresee their being sold in the United States, but not necessarily in Pennsylvania (A10). And, while this Court held that foreseeability may not be irrelevant, *it is limited to one's ability to foresee being brought into a specific state,* not foreseeability that the product will find its way into the forum state. *World-Wide Volkswagen Corp.* v. *Woodson, supra,* at 297.

As to the claim that the blades sold by Uddeholm were put into Pennsylvania's "stream of commerce" and that this constitutes sufficient minimum contacts to warrant exercise of jurisdiction over Meyer, the record clearly establishes that Uddeholm took title of the goods in West Germany and that Meyer had no control over the products after such time (A3, 32).

While respondent Meyer may have expected to derive some indirect benefit from the United States market (A10), this is not sufficient to warrant exercise of jurisdiction by the Pennsylvania courts.

As noted in *DeJames* v. *Magnificence Carriers, Inc.,* 654 F.2d 280, 285 (3rd Cir. 1981), this theory "developed in *products liability* cases in which the product had traveled through an extensive chain of distribution before reaching the ultimate consumer" because "the manufacturer bene-

fits legally from the protection provided by the laws of the forum state for its products, as well as economically from indirect sales to forum residents."

The case at bar does not involve a products liability case where an individual sustained physical injury in the forum state and thus, the need for such broad jurisdiction may be less. *Daetwyler Corp.* v. *R. Meyer,* 762 F.2d, 290, *supra,* at 299 (A18-19).

Nor does respondent receive economic benefit from the residents of Pennsylvania. The record amply demonstrates that respondent's American distributor, Korn, did not sell blades in Pennsylvania (A17, 32-33). As to Uddeholm's "sporadic sales" in Pennsylvania, these were insufficient to give Meyer ample opportunity to foresee being brought into a Pennsylvania court since title passed to Uddeholm in West Germany and thereafter Meyer had no control over where the products went (A3, 9).

Moreover, the "stream of commerce" cases, as was pointed out by the Third Circuit in *Daetwyler Corp.* v. *R. Meyer,* 762 F.2d 290, *supra,* at 299 (A20), indicate "the manufacturers involved had made deliberate decisions to market their products in the forum state."

The respondent Meyer made no such decisions since he lost control over the products once they were sold to Uddeholm and Korn (A3, 17, 31-32).

Conclusion

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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